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No.

In The

# Supreme Court of the United States

October Term, 1993

WILLIAM WARFEL, JR. and SUSAN WARFEL,

*Petitioners,*

*vs.*

ROBERT W. BRADY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT JOHN BRADY,

*Respondent.*

*Petition for Writ of Certiorari to the Court of Appeals of Maryland*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the "nonclaim statute" of Maryland's Probate Code, Estates & Trusts Article Sec. 8-103, involves substantial state action, as it is not "self-executing," and denies due process of law to creditors because it fails the minimum constitutional notice requirements under the principles of *Tulsa Professional Collection Services v. Pope, Executrix*, 485 U.S. 478 (1988).

## LIST OF PARTIES

The parties involved in the lower court were William Warfel, Jr. and Susan Warfel, Petitioners, and Robert W. Brady, Personal Representative of the Estate of Robert John Brady, Respondent.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented for Review | i |
| List of Parties | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Opinions Below | 2 |
| Statement of Jurisdiction | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 4 |
| I. *Tulsa Professional Collection Services v. Pope* | 4 |
| II. The Maryland statute is a hybrid that contains both the elements of a self-executing statute of limitations and non-claim statute and because of this is constitutionally defective according to the *Tulsa* case. | 7 |
| III. Because there is significant state involvement, Section 8-103(a) of the Maryland Code Annotated (Estates and Trusts), the Maryland statute is not a self-executing statute. | 9 |

*Contents*

*Page*

IV. The Maryland Court of Special Appeals has incorrectly held that Section 8-103(a) of the Maryland Code Annotated (Estates & Trusts) is a self-executing statute. ..... 10

Conclusion ..... 12

## TABLE OF CITATIONS

**Cases Cited:**

Lampton v. LaHood, 617 A.2d 1142 (Md. App. 1993) .... 10, 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) ..... 10

Ohio Casualty Insurance Company v. Hallowell, 617 A.2d 1143 (1993) ..... 11

Tulsa Professional Collection Services v. Pope, Executrix, 485 U.S. 478 (1988) .....i, 4, 5, 6, 7, 8, 9

**Statutes Cited:**

28 U.S.C. § 1257(a) ..... 2

Md. Code Ann. (Estates & Trusts) § 7-103 ..... 2

Md. Code Ann. (Estates & Trusts) § 7-103.1 ..... 10

Md. Code Ann. (Estates & Trusts) § 8-103 ..... i, 3, 4

*Contents*

*Page*

Md. Code Ann. (Estates & Trusts) § 8-103(a) .....4, 7, 9, 10

Md. Code Ann. (Estates & Trusts) § 8-103(a)(1) ..... 8

**United States Constitution Cited:**

Fourteenth Amendment ..... 2

**APPENDIX**

Appendix A — Court of Appeals Order Denying Petition for Writ of Certiorari Dated June 24, 1993 ..... 1a

Appendix B — Court of Special Appeals Opinion, *Warfel v. Brady*, 95 Md. App. 1, 619 A.2d 171 (1993) ..... 2a

Appendix C — Annotated Code of Maryland (Estates and Trusts), § 7-103.1 ..... 15a

Appendix D — Annotated Code of Maryland (Estates and Trusts), § 8-103 ..... 16a

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ROBERT W. BRADY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT JOHN BRADY,

*Respondent.*

*Petition for Writ of Certiorari to the Court of Appeals of Maryland*

## PETITION FOR WRIT OF CERTIORARI

William Warfel, Jr., *et al.*, the Petitioners herein, pray that a Writ of Certiorari issue to review the Order ofthe Court of Appeals of Maryland denying the Petition for Writ of Certiorari in the above case, which was denied on June 24, 1993.

## OPINIONS BELOW

The Circuit Court for Anne Arundel County entered its decision on February 27, 1992, dismissing the case of *Warfel et al. v. Brady*, Case No. 3114291. The decision of the Court of Special Appeals of Maryland affirmed the decision of the lower court. The Court of Appeals of Maryland denied Petitioners' Petition for Writ of Certiorari on June 24, 1993.

## STATEMENT OF JURISDICTION

The judgment of the Court of Special Appeals of Maryland was entered on January 28, 1993. On June 24, 1993 an Order was entered, denying a timely Petition for Writ of Certiorari to the Court of Appeals of Maryland. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part:

Section 1:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

Md. Code Ann. (Estates & Trusts) § 7-103. *See* Appendix. C, 15a.

Md. Code Ann. (Estates & Trusts) § 8-103. *See* Appendix D, 16a.

## STATEMENT OF THE CASE

On April 2, 1989, William Warfel was shot and killed. The Petitioners allege that he was killed by Robert John Brady, who subsequently died on November 24, 1989. On April 2, 1990, the Petitioners filed a Complaint in the Circuit Court for Anne Arundel County seeking damages and establishing *lis pendens* against real property owned by Robert John Brady.

At the time the Petitioners had filed their initial Complaint, Petitioners were unaware that Robert Brady had died on November 24, 1989. Petitioners had mistakenly named Robert John Bray as Defendant rather than Robert John Brady.

The Estate of Robert John Brady was opened with the Register of Wills for Anne Arundel County on April 19, 1990. Also on April 19, 1990, Robert W. Brady was appointed to serve as Personal Representative of the Estate of Robert John Brady by the Register of Wills for Anne Arundel County. On April 25, 1990, May 2, 1990 and May 9, 1990, the Estate of Robert John Brady published notice to creditors in the Maryland Gazette advising creditors that claims not filed within the earlier of nine (9) months from the date of Brady's death, or two (2) months after the delivery of notice by the Respondent, would be unenforceable.

Petitioners learned of Brady's death and filed an Amended Complaint on December 19, 1990, substituting Respondent as Defendant.

The Respondent claimed Petitioners' Amended Complaint was barred by limitations and subsequently moved for summary judgment. Although Respondent's Motion for Summary Judgment

was initially denied, the Respondent's Move to Dismiss Petitioners' Amended Complaint was barred by limitations. At a hearing in the Circuit Court for Anne Arundel County held on February 3, 1992, the Respondent's Motion to Dismiss was granted.

From this decision of the Circuit Court for Anne Arundel County, the Petitioners filed an appeal to the Court of Special Appeals. The Court of Special Appeals filed its opinion on January 28, 1993. The mandate was issued on March 1, 1993. The Petitioners filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland and the Court of Appeals denied said petition on June 24, 1993.

## REASONS FOR GRANTING THE WRIT

### I.

### *TULSA PROFESSIONAL COLLECTION SERVICES v. POPE*

In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) this Court found unconstitutional an Oklahoma statute which provided that creditors' claims against a decedent are forever barred unless they are presented to the executor or executrix within two months of the date of first publicaton. In response to the *Tulsa* case the Maryland legislature enacted legislation which revised Section 8-103(a) of the Md. Code Ann. (Estates & Trusts). Section 8-103 now provides that creditors' claims will be barred unless they are filed within the earlier of two dates: (i) nine months after the date of the decedent's death, or (ii) two months after the date on which the personal representative gives the creditors written notice of the time within which a claim must be presented.

The issue of whether there is a difference between nonclaim statutes and statutes of limitations was of critical importance in the *Tulsa* case. The Court concluded there was a significant difference between a nonclaim statute and a statute of limitation. The Court said:

> Nonclaim statutes come in two basic forms. Some provide a relatively short time period, generally two to six months, that begin to run after the commencement of probate proceedings. Others call for a longer period, generally one to five years, that runs from the decedent's death.

*Tulsa* at 480.

This Court held that the "purpose of the nonclaim statute is to facilitate the handling and closing of estates." This Court further noted that the legislative intent behind such statutes was to expedite and quicken the disposal of estate administration.

This Court in *Tulsa* reserved on the question of the length of time of nonclaim statutes which run from the date of death of the decedent as they found significant state involvement in the Oklahoma nonclaim statute.

> We also have no occasion to consider the proper characterization of nonclaim statutes that run from the date of death, and which generally provide for longer time periods, ranging from one to five years.

*Tulsa* at 488.

However, this Court did hold that for a statute to be self-

executing the state had no role beyond the enactment of the statute of limitations.

> While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protection of the Due Process Clause.

*Tulsa* at 486-487.

Critical to this Court's analysis in determining whether the Oklahoma statute required the protection of the Due Process Clause was whether there was significant state involvement.

The determinative factor for this Court's finding of state action was that the Oklahoma probate court appointed administrators and then directed them to immediately publish notice to creditors. This Court ruled that by appointing an estate administrator the probate court's involvement rose to state action and therefore, the nonclaim statute was no longer self-executing. The Oklahoma statute required the court to appoint an executor or executrix which would then trigger the period of time in which the creditors of the decedent would have to file their claims. Only after court appointment of the executor was made did the statute provide for any notice. Additionally, the Oklahoma statute also required that copies of the notice and an affidavit of publication had to be filed with the court. These were also found by the *Tulsa* Court to be areas of state involvement:

> It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and

> substantial that is must be considered state action subject to the restrictions of the Fourteenth Amendment.

*Tulsa* at 487.

## II.

## THE MARYLAND STATUTE IS A HYBRID THAT CONTAINS BOTH THE ELEMENTS OF A SELF-EXECUTING STATUTE OF LIMITATIONS AND A NON-CLAIM STATUTE AND BECAUSE OF THIS IS CONSTITUTIONALLY DEFECTIVE ACCORDING TO THE *TULSA* CASE.

Section 8-103(a) contains elements of both a self-executing statute of limitations and a short nonclaim statute. In this respect the Maryland statute is not unique. As the *Tulsa* Court observed, "It is true that nonclaim statutes generally possess some attributes of statutes of limitations." *Tulsa* at 486.

On the one hand the statute says that all claims are barred unless filed within nine (9) months after the death of the decedent. On the surface this appears to be a straight statute of limitations. However, as *Tulsa* implied this is an unusually short period of time for a self-executing statute.

The other portion of the relevant Maryland statute is identical to the nonclaim Oklahoma statute that the *Tulsa* Court found to be unconstitutional. It states that claims will be forever barred unless they are made within two months of the posting notice.

Therefore, Maryland has a combination statute that combines the elements of a statute of limitations and a short nonclaim statute. It was previously stated that the statute provides for the application

of the earlier of the two dates. Therefore, the time periods that are designated, nine (9) months after the death of the decedent and two (2) months after the date of publication, are interrelated and even dependent upon one another. This interdependence between the nine-month limitations and the two-month notice to creditors gives rise to the inference that the straight nine-month limitation and the two-month notice are inextricably interwined. As the statute was amended after the *Tulsa* case, an inquiry must be made into whether an additional time period was intended.

In actuality, the nine-month time period from the date of death of the personal representative is meaningless as it does not add any time to the two-month interval from the date of posting which the Supreme Court found to be defective in the *Tulsa* case. The facts of the instant case underscore the reality that the nine-month provision fails to add to the time available under the pre-*Tulsa* statute.

In the case at bar notice was posted in the Maryland *Gazette* on April 25th, 1990, May 2, 1990 and May 9th, 1990. Given these notice dates, according to § 8-103(a)(1), all claims would have to have been presented by July 9, 1990, two months after posting notice.

This is clearly an insufficient time to allow a creditor to ascertain whether an estate has been opened and to file suit against the personal representative. The period of limitations is far too short and the posting period is not long enough.

Mr. Brady died on November 24, 1989. Nine (9) months after his death would have been August 24, 1990 which would leave little more than one month in which to file claims based on the information provided through the posting. (The opening of the estate of Robert W. Brady did not occur until April 19, 1990.)

In fact, the nine-month time period allowed after decedent's death under the revised legislation is meaningless. The statute provides that the claim must be presented within the earlier of the two dates — nine months after the death of the decedent or two months after the personal representative posts notice. From the way in which the statute is worded, adding nine months after the decedent's death in reality fails to add in any way to the time given by the statute, which is triggered by state action. The legislature has in essence preserved intact the posting notice that the *Tulsa* Court held was not sufficient to withstand due process scrutiny. By providing for nine (9) months from the date of death of the decedent, the appearance is given of an attempt to comply with the *Tulsa* case, but no additional time is actually given to the period of time in the *Tulsa* case which the Supreme Court said was constitutionally insufficient. Because of the language of the statute, Petitioners had only a two-month period in which they could have amended their suit and brought it against the personal representative in order for there to have been a valid claim under Maryland law.

## III.

## BECAUSE THERE IS SIGNIFICANT STATE INVOLVEMENT, SECTION 8-103(a) OF THE MARYLAND CODE ANNOTATED (ESTATES AND TRUSTS), THE MARYLAND STATUTE IS NOT A SELF-EXECUTING STATUTE.

The Maryland Legislature did not solve the problem of drafting legislation in conformity with the requirements of the *Tulsa* Court. The two-month posting notice is still an egregious feature of the statute. As indicated above, this feature requires the involvement of the court to such an extent that there is no question that significant state involvement is entailed.

Because such a significant part of the pertinent legislation is unconstitutional, it follows that the entirety of the statute is defective. If one part of a statute is defective, the whole statute must fail if the defective portion cannot be severed. It is impossible to sever the parts of the statute entailing significant state involvement and continue to maintain it is a self-executing statute.

The Maryland statute is not self-executing, and therefore must comply with the due process requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The pertinent Maryland statute enacted after *Tulsa, Section 7-103.1 of the Maryland Code Annotated (Estates and Trusts)*, indicates that the legislature was cognizant of the importance of notifying creditors. The type of notice contemplated was real notice, not mere publication notice.

The fact is that the Petitioners did not get the notice contemplated by § 7.103.1.

However, notwithstanding this lack of notice, the Petitioners amended their suit and filed directly against the Personal Representative of Robert W. Brady on December 19, 1990. This occurred within five months after the claim was barred by Section 8-103 (a) of the *Estates and Trusts Article*.

## IV.

## THE MARYLAND COURT OF SPECIAL APPEALS HAS INCORRECTLY HELD THAT SECTION 8-103(a) OF THE MARYLAND CODE ANNOTATED (ESTATES & TRUSTS) IS A SELF-EXECUTING STATUTE.

The Court of Special Appeals has recently confronted the issue of whether § 8-103 (a) is a self-executing statute. In the case of *Lampton v. LaHood*, 617 A.2d 1142 (Md. App. 1993), the Court

of Special Appeals said the following about this statute:

> In 1989, however, the General Assembly enacted Chapter 496 of the Laws of 1988 to amend § 8-103 to conform with the standards of statutory self-execution enunciated in *Pope*. *See* Floor Report, House Bill 3, Senate Judicial Comm. (1989). Hence, Section 8-103 now does contain a self-executing statute of limitations, *i.e.*, "all claims against an estate . . . are forever barred . . . unless presented within the earlier of the following dates (1) Six months after the date of the decedent's death; or (2) Two months after the personal representative delivers to the creditor a copy of a notice (of the decedent's death.)"

*Lampton* at 1148.

As is evident from the quotation above, the reasoning in the *Lampton* case is superficial, conclusory, and not at all persuasive.

The issue has also been confronted by the Court of Special Appeals in the *Ohio Casualty Insurance Company v. Hallowell,* 617 A.2d 1143 (1993). The reasoning in this case is similar to the reasoning in the *Lampton* case in that the period of time in which to file claims runs from the date of death of the decedent and that this period of time is not controlled by state action. There was no consideration given to the section of the statute which provides that the period of time runs from the time the personal representative gives notice and that the earliest of the two dates controls.

Because of this, the issue in this case is critical for review and the interest of justice requires a review by this Court of this statute.

## CONCLUSION

For the foregoing reasons, Petitioners pray that this Honorable Court grant this Petition for Writ of Certiorari and upon review, reverse the decision of the Court of Appeals of Maryland and the Court of Special Appeals of Maryland.

Respectfully submitted,

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## APPENDIX A — COURT OF APPEALS ORDER DENYING PETITION FOR WRIT OF CERTIORARI DATED JUNE 24, 1993

In the

Court of Appeals of Maryland

Petitioner Docket No. 48

September Term, 1993

No. 546, September Term, 1993, Court of Special Appeals

WILLIAM WARFEL, JR. et al.

v.

ROBERT W. BRADY Personal Representative of the Estate of Robert John Brady

ORDER

Upon consideration of the petition for a writ of certiorari and supplement to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and supplement be and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: June 24, 1993

## APPENDIX B — COURT OF SPECIAL APPEALS OPINION, *WARFEL v. BRADY*, 95 MD. APP. 1, 619 A.2d 171 (1993)

William WARFEL, Jr., et al.

v.

Robert W. BRADY, Personal Representative of the Estate of Robert John Brady.

No. 546, Sept. Term, 1992.

Court of Special Appeals of Maryland.

Jan. 28, 1993.

Robert G. Skeen (Goldman & Skeen, P.A. on the brief), Baltimore, for appellants.

Kevin P. Murphy (Scherr, Cole & Murphy on the brief), Glen Burnie, for appellee.

Argued before ALPERT, WENNER and FISCHER, JJ.

WENNER, Judge.

Appellants, William Warfel, Jr. and Susan Warfel, personal representatives of the estate of William Warfel, have appealed from a judgment of the Circuit Court for Anne Arundel County dismissing their amended complaint against appellee, Robert W. Brady, personal representative of the estate of Robert John Brady. Appellants present six issues for our consideration, which they characterize as follows:

*Appendix B*

I. That the ruling of Judge Rushworth overturning the decision of Judge Lerner who denied appellee's motion for summary judgment and motion to reconsider and/or revise the denial of summary judgment violated the law of the case doctrine;

II. In the case at bar appellants filed a *lis pendens* action with the complaint and amended complaint and that with the filing of the *lis pendens* action timely notice was given to the personal representative of the *lis pendens* action and an outstanding claim against the property of the estate;

III. That the filing of a *lis pendens* action creates a sufficient lien against the property of an estate the perfection and enforcement of which cannot be negated by Section 8-103 of the Estates and Trusts Article;

IV. That the standard as set forth in *Tulsa Professional Collection Services, Inc. v. Pope* that executors make "reasonably diligent efforts" to ascertain creditors was not met in the case at bar;

V. That the appellants were not required to file a claim pursuant to Section 8-104(b) & (c) of the Estates and Trusts Article as suit has been filed against the estate of the decedent within nine months of the death of the decedent;

VI. That Section 8-103(a) of the Estates and Trusts Article is unconstitutional in requiring that whether or not reasonably diligent efforts are made by the executor to locate ascertainable creditors claims will be

> extinguished nine months after the date of death of the decedent or two months after the personal representative mails notice to a creditor.

For ease of discussion and analysis, we have combined issues II. and III, and issues IV. and VI.

Concluding that appellants' amended complaint was properly dismissed, we shall affirm the judgment of the circuit court.

## BACKGROUND

The genesis of this appeal was the death of William Warfel (Warfel), on April 2, 1989. Warfel was the father of William Warfel, Jr. and Susan Warfel. According to appellants, Warfel died as the result of an assault and battery committed upon him by Robert John Brady. On April 2, 1990, appellants filed a complaint in the Circuit Court for Anne Arundel County, seeking damages of twenty nine million dollars and establishing *lis pendens* against real property owned by Robert John Brady.

Unfortunately for appellants, the complaint was riddled with inaccuracies and mistakes. The first count was a survival claim on behalf of Warfel. According to the complaint, appellants were the personal representatives of Warfel's estate.[1] Actually, Warfel's estate was not opened and appellants were not appointed personal representatives until May 17, 1991.

Instead of naming Robert John Brady as defendant, appellants' complaint named Robert John *Bray* as defendant. In

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1. Appellants' amended complaint, filed on December 19, 1990, also named them as personal representatives of the Warfel estate.

addition, the address given for the defendant was not Robert John Brady's address. Moreover, when they filed their initial complaint, appellants were not aware that Brady had died on November 24, 1989. In any event, the initial complaint was never served.[2]

Appellee was appointed personal representative of Robert John Brady's estate on April 19, 1990. As required, he published a notice of appointment and notice to creditors on April 25, May 2, and May 9, 1990.[3] The notice to creditors warned that claims not filed within the earlier of nine months from the date of Brady's death, or two months after delivery of notice by appellee, would be unenforceable. During that period, appellants filed no claim against Brady's estate.

Appellants learned of Brady's death and filed an amended complaint on December 19, 1990, substituting appellee as defendant. The amended complaint also named the decedent correctly as Robert John *Brady*. Appellee responded to appellants' amended complaint, claiming it was barred by limitations. Appellee subsequently moved for summary judgment, contending that appellants' action was barred by their failure to file a claim with the estate in compliance with § 8-103 of Md. Code, (1974, 1991 Repl. Vol., 1992 Cum. Supp.) Estates and Trusts Article.[4]

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2. The record before us indicates that a summons was issued on April 10, 1990, and mailed to appellants' attorney for service. By letter dated May 14, 1990, appellants' attorney returned the summons to the clerk of the circuit court and requested that service be made by the Anne Arundel County Sheriff. There is nothing in the record indicating that service was ever made. Moreover, the record does not reflect how the amended complaint was served.

3. Section 7-103 of Md. Code (1974, 1991 Repl. Vol., 1992 Cum. Supp.)

4. All references are to the Estates and Trusts Article of the Maryland Code, unless otherwise noted.

*Appendix B*

Appellee also contended that appellants' initial complaint was a nullity because it had been filed against a dead man.

Following a hearing, appellee's motion for summary judgment was denied, as was appellee's motion to reconsider and/or revise the denial of summary judgment.

Thereafter, appellee moved to dismiss appellants' amended complaint, again asserting that it was barred by limitations. A hearing was held on February 3, 1992, and appellee's motion to dismiss was granted.

This appeal followed.

DISCUSSION

In ruling on appellee's motion to dismiss, the hearing judge received evidence from outside the pleadings and found, as a matter of law, that appellants' complaint was barred by limitations. In doing so, the hearing judge apparently treated appellee's motion to dismiss as a motion for summary judgment. We note that Md. Rule 2-322(c) empowers the court to rule on a motion to dismiss for failure to state a claim upon which relief may be granted as one for summary judgment, when matters outside the pleadings are presented to and considered by the court. A defense of limitations may be raised by a motion to dismiss for failure to state a claim upon which relief may be granted. *Antigua Condo. Ass'n v. Melba Investors Atl., Inc.*, 65 Md. App. 726, 501 A.2d 1359, *vacated and remanded on other gr'ds*, 307 Md. 700, 517 A.2d 75 (1986).

When reviewing a grant of summary judgment, we must determine whether the trial court was legally correct. *Brewer v. Mele*, 267 Md. 437, 298 A.2d 156 (1972), *Hurt v. Stillman & Dolan, Inc.*, 35 Md. App. 644, 371 A.2d 1137 (1977).

*Appendix B*

*Issue I.*

Appellants first contend that the hearing judge was precluded from considering the issues raised by appellee's motion to dismiss. According to appellants, the issues raised by the motion to dismiss were the same issues previously raised by appellee's motion for summary judgment, and the rulings of the previous hearing judge were the "law of the case." Thus, the subsequent hearing judge had violated the law of the case doctrine by granting appellee's motion to dismiss.

As we observed in *Ralkey v. Minnesota Mining & Mfg. Co.*, 63 Md. App. 515, 492 A.2d 1358 (1985):

> "The law of the case doctrine generally provides that a legal rule of decisions between the same parties in the same case controls in subsequent proceedings between them. Typically, a ruling by the trial court remains binding until an appellate court reverses or modifies it." (Citations omitted.)

*Id.*, 63 Md. App. at 520, 492 A.2d 1358. *See also, Kline v. Kline*, 93 Md. App. 696, 614 A.2d 984 (1992).

According to Maryland law, the law of the case doctrine applies to decisions finally disposing of the case. *Ralkey, supra*, 63 Md. App. at 521, 492 A.2d 1358. It is beyond cavil that the doctrine has no application to courts of coordinate jurisdiction before entry of a final judgment. *Placido v. Citizens Bank and Trust Co. of Md.*, 38 Md. App. 33, 379 A.2d 773 (1977). Moreover, summary judgment may be properly granted in a case even though it was denied earlier. *Joy v. Anne Arundel County*, 52 Md. App. 653, 451 A.2d 1237 (1982), *cert. denied*, 295 Md. 440 (1983).

*Appendix B*

In the case *sub judice,* the denial of appellee's motion for summary judgment and to reconsider and/or revise did not "finally dispose" of the case. Quite the contrary, those rulings permitted appellants to proceed. The denial of summary judgment is not a final judgment from which an appeal may be taken. *See, Melbourne v. Griffith,* 263 Md. 486, 283 A.2d 363 (1971).

In short, the subsequent hearing judge was not precluded from granting appellee's motion to dismiss. There was no error.

*Issues II and III.*

As we mentioned earlier, appellants' complaint and amended complaint sought to establish *lis pendens* and to enjoin the transfer, conveyance, encumbrance or other disposition of real property owned by Robert John Brady.

Issues II and III concern whether appellants' attempt to establish *lis pendens* timely notified appellee of appellants' claim, and whether it created a lien against real property belonging to the Brady estate, despite the provisions of § 8-103(a). Inasmuch as *lis pendens* applies neither to appellants' initial complaint nor to appellants' amended complaint, we need not address the specific issues raised by appellants.

*Lis pendens* literally means a pending action; thus, the doctrine of *lis pendens* concerns the jurisdiction, power, or control that a court acquires over real property involved in an action, pending final judgment. 54 C.J.S. Lis Pendens § 2 (1987). The doctrine applies only to cases in which the complaint directly relates to the property, or the ultimate aim of the complaint is to subject the property to disposal by a decree of court. *Angelos v.*

*Appendix B*

*Maryland Casualty Co.*, 38 Md. App. 265, 380 A.2d 646 (1977); *Permanent Fin. Corp. v. Taro*, 71 Md. App. 489, 526 A.2d 611, *cert. granted*, 311 Md. 193, 533 A.2d 670 (1987), *appeal dismissed*, Jan. 26, 1988; *Feigley v. Feigley*, 7 Md. 537 (1855); *Applegarth v. Russell*, 25 Md. 317 (1866).

It is generally recognized that *lis pendens* may not be predicated upon an action seeking recovery of money damages prior to securing a valid judgment that has become a lien upon property subject to *lis pendens*. *Polk v. Schwartz*, 166 N.J. Super. 292, 399 A.2d 1001 (1979); *Cassia v. Cassia*, 125 Misc. 2d 606, 480 N.Y.S.2d 84 (1984); *Doby v. Lowder*, 72 N.C. App. 22, 324 S.E.2d 26 (1984); *Pournaras v. Hopkins*, 11 Ohio App. 3d 51, 463 N.E.2d 67 (1983); *Bramall v. Wales*, 29 Wash. App. 390, 628 P.2d 511 (1981).

Despite overwhelming authority to the contrary, appellants insist that the doctrine of *lis pendens* applies in this case. We disagree. Appellants are seeking money damages. Appellants' complaint in no way involves property of the Brady estate upon which appellants seek to establish *lis pendens*. In our view, appellants have attempted to short cut the legal process by seeking to establish *lis pendens* before obtaining a final judgment against appellee. For all of these reasons, *lis pendens* does not apply.

*Issues IV. and VI.*

Appellants next contend that their complaint gave appellee sufficient notice that appellants were creditors of the Brady estate, had appellee made a reasonable and diligent effort to ascertain the identity of creditors as required by *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d

565 (1988) and § 7-103.1.[5] While acknowledging that what constitutes a reasonably diligent effort has not yet been decided by Maryland appellate courts, appellants assert that a reasonably diligent effort required appellee to review all personal records of the decedent and all docket entries in the Circuit Court for Anne Arundel County, the county in which the decedent resided.

We begin by noting that § 7-103.1(c)(1) specifically provides that the time within which a creditor may present his claim is not extended beyond nine months from decedent's death because of the failure of the creditor to receive notice under § 7-103.1. It matters not that the failure to receive notice is occasioned by the failure of the personal representative to make a reasonably diligent effort to identify and notify creditors.

Further, even if such a search constitutes a reasonably diligent effort, we fail to see how such a search could have disclosed appellants as creditors of the Brady estate. A review of Brady's personal records and of the docket entries in the Circuit Court for Anne Arundel County would not have alerted appellee to appellants' claim.

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5. Section 7-103.1(a) provides as follows:

> Promptly after appointment, the personal representative of a decedent's estate shall
>
> (1) Makes a reasonably diligent effort to ascertain the names and addresses of the decedent's creditors; and
>
> (2) Mail or otherwise deliver a notice to those creditors whose names and addresses he has ascertained of the time within which their claims may be presented under § 8-103(a).

*Appendix B*

As we have said, appellants' initial complaint was filed on April 2, 1990 and named "B-R-A-Y," not "B-R-A-D-Y" as defendant. In addition, appellants' initial complaint failed to give Brady's correct address.

Appellants' complaint was filed after Brady's death and not served. We fail to see how a complaint that was never served, filed against Bray, after Brady's death, could have been ascertained by examining Brady's personal records.

While appellants' complaint correctly described the property upon which *lis pendens* was attempted to be established, in order to have become aware of appellants' complaint it would have been necessary for appellee to have reviewed *every* complaint filed in the Circuit Court for Ann Arundel County, regardless of whether the decedent was the named defendant. We believe that such a search would exceed those contemplated by the term, a reasonably diligent effort. In fact, we believe the requirement of such efforts to be ridiculous. Based upon the facts in the case *sub judice,* we find nothing in *Tulsa* requiring a different result.

In any event, we have recently held that § 8-103, which was enacted by the legislature in response to *Tulsa,* is not unconstitutional. *See Ohio Casualty Ins. Co. v. Hallowell,* 94 Md.App. 444, 617 A.2d 1134 (1993); *see also Lampton v. LaHood,* 94 Md. App. 461, 617 A.2d 1142 (1993), in which we found that § 8-103(a) in its entirety does not violate the due process rights of a creditor.

*Issue V.*

Finally, appellants contend that they were not required to file a claim under §§ 8-104(b) & (c) because their complaint was filed against the Brady estate within nine months of Brady's death.

*Appendix B*

Section 8-104(d) provides:

> "When a cause survives death, the claimant is not required to file a claim under subsections (b) or (c). He may commence an action against the estate or against a person to whom the property has been distributed, but the commencement of the action must occur within the time limited for the filing of claims."

According to appellants, their initial complaint filed on April 2, 1990, satisfied § 8-104(d) even though *Brady* had not been designated as defendant and the complaint involved no one to whom property belonging to the Brady estate had been distributed. We don't see it quite that way.

In *Burket v. Aldridge*, 241 Md. 423, 216 A.2d 910 (1966), the Court of Appeals held that a suit for personal injuries filed against a personal representative must be filed within the three year period of limitations, as well as within the period of limitations for actions against a personal representative. The Court also observed that Burket's action had no legal effect since Smith, at the time the action was filed, was dead and "an action against a dead man is a nullity." *Id.*, 241 Md. at 430, 216 A.2d 910.

Appellants contend that *Burket* has been overruled by statute.[6]

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6. Section 8-102(b) provides:

> "Subject to § 8-103(a), a period of limitations which would terminate, except for the death of the decedent, during the period from the death of the decedent until nine months after the date of the decedent's death, is automatically extended until nine months after the date of the decedent's death."

*Appendix B*

We agree that § 8-102(b) extended until August 24, 1990, nine months after Brady's death, the time within which appellants could have filed a complaint against Brady's estate. While we are not persuaded that § 8-102(b) in any manner altered the observation made in *Burket* that an action against a dead man is a nullity, we need not decide that issue since we conclude that appellants' action was not timely filed under § 8-104(b).[7] We explain.

In order for appellants' complaint to have been timely filed, the initial complaint must have been considered to have tolled limitations. According to appellants, that is the case here because misnomers are generally regarded as mistakes which may be freely amended. Md. Rule 2-341(c).

We note the liberality of Rule 2-341, but remind appellants that the right to amend is not limitless. Rule 2-341 includes the caveat that amendments are to be freely allowed *when justice permits.* Whether an amendment of a misnomer should be permitted depends upon whether the correct person, however misnamed, was put on notice of pending suit. 67A C.J.S., Parties § 172. *See also, Dart Drug Corp. v. Hechinger Co., Inc.*, 272 Md. 15, 320 A.2d 266 (1974) and *Abromatis v. Amos,* 127 Md. 394, 96 A. 554 (1916) (amendment to correct misnomer allowed where correct defendant served with process despite being incorrectly named in complaint).

In the case *sub judice,* appellants have presented no evidence suggesting that appellee, as personal representative of the Brady

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7. For the same reason, we find it unnecessary to address appellee's assertion that because appellants were not appointed personal representatives until May 17, 1991, the survival claim contained in Count I of the complaint and amended complaint, filed prior to the appointment, is a nullity.

estate, was aware of appellants' complaint before being served with appellants' amended complaint on January 16, 1991. Under the circumstances, we believe it would be unjust for us to permit appellants' amended complaint to relate back to appellants' initial complaint, which was filed on April 2, 1990.

In short, we find that appellants' claim against the Brady estate was not timely filed. Nor did § 8-104(d) excuse appellants from filing a claim against the estate.

The circuit court correctly dismissed appellants' amended complaint.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

## APPENDIX C — ANNOTATED CODE OF MARYLAND (ESTATES AND TRUSTS), § 7-103.1

**§ 7-103.1 Notice to creditors.**

(a) *In general.* Promptly after appointment, the personal representative of a decedent's estate shall

(1) Make a reasonably diligent effort to ascertain the names and addresses of the decedent's creditors; and

(2) Mail or otherwise deliver a notice to those creditors whose names and addresses he has ascertained of the time within which their claims may be presented under § 8-103(a).

(b) Sufficiency of notice — Notice under this section shall be sufficient if the personal representative mails or otherwise delivers to a creditor a copy of the notice required by § 7-103(b).

(c) Failure to receive notice. — (1) The failure of a creditor to receive notice under this section shall not extend the time within which the creditor may present his c laim beyond nine months from the date of the decedent's death.

(2) The personal representative, individually and on behalf of the estate, shall not be liable for failing under this section to ascertain or notify a creditor or for giving notice to a person who is not a creditor of the decedent. (1989, ch. 496, § 1.)

## APPENDIX D — ANNOTATED CODE OF MARYLAND (ESTATES AND TRUSTS), § 8-103

### § 8-103. Limitation on presentation of claim.

(a) *General.* — Except as otherwise expressly provided by statute with respect to claims of the United States and the State, all claims against an estate of a decedent, whether due or to become due, absolute or continent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are forever barred against the estate, the personal representative, and the heirs and legatees, unless presented within the earlier of the following dates:

(1) Nine months after the date of the decedent's death; or

(2) Two months after the personal representative mails or otherwise delivers to the creditor a copy of a notice in the form required by § 7-103 or other written notice, notifying the creditor that his claim will be barred unless he presents the claim within 2 months from the mailing or other delivery of the notice.

(b) *Claim for slander.* — A claim for slander against an estate of a decedent which arose before the death of the decedent, is barred even if an action was commenced against and service of process was effected on

the decedent before his death.

(c) *Conduct of personal representative.* — A claim against the estate based on the conduct of or a contract with a personal representative is barred unless an action is commenced against the estate within six months of the date the claim arose.

(d) *Liens not affected.* — Nothing in this section shall affect or prevent an action or proceeding to enforce a mortgage, pledge, judgment or other lien, or security interest upon property of the estate.

(e) *Certain actions for personal injuries and/or damages to property instituted before death.* — If the decedent had been duly served with process before his death, nothing in this section shall affect an action for injuries to the person and/or damage to property which was commenced against the decedent. (An. Code 1957, art. 93, § 8-103; 1974, ch. 11, § 2; 1989, ch. 496, § 1.)

Supreme Court, U.S.
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No. 93-483

In The

# Supreme Court of the United States

October Term, 1993

WILLIAM WARFEL, JR. and SUSAN WARFEL,

*Petitioners,*

vs.

ROBERT W. BRADY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT JOHN BRADY,

*Respondent.*

**Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland**

## BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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## LIST OF PARTIES

The parties involved in the lower court were Plaintiffs:

1. William Warfel, Jr. and Susan Warfel, as Personal Representatives of the Estate of William Warfel, deceased.
2. William Warfel Jr., as son of the deceased, William Warfel.
3. Susan Warfel as daughter of the deceased, William Warfel.

and Defendant:

4. Robert W. Brady, as Personal Representative of the Estate of Robert John Brady.

TABLE OF CONTENTS

Page

LIST OF PARTIES ..... i

TABLE OF AUTHORITIES ..... iii

COUNTER STATEMENT OF FACTS ..... 1

SUMMARY OF ARGUMENT – REASONS FOR DENYING THE WRIT ..... 2

ARGUMENT ..... 3

I. The Maryland nonclaim statute is self-executing.. 3

II. Section 8-103(a)(2) of the Maryland nonclaim statute complies with the Due Process Clause ..... 4

III. Petitioners lack standing to contest constitutionality of Section 8-103(a)(2) of the Maryland nonclaim statute ..... 5

IV. The Due Process Clause does not require actual notice to unknown creditors or those whose claims cannot be ascertained through reasonably diligent efforts ..... 6

V. Due process does not require actual notice to those with mere conjectural claims ..... 6

CONCLUSION ..... 7

## TABLE OF AUTHORITIES

Page

*Lampton v. LaHood*, 94 Md. App. 461, 617 A.2d 1142 (1993) ..... 3

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) ..... 6

*Ohio Casualty Ins. Co. v. Hallowell*, 94 Md. App. 444, 617 A.2d 1134 (1993) ..... 3

*Texaco, Inc. v. Short*, 454 U.S. 516 (1982) ..... 4

*Tulsa Professional Collection Services, Inc. v. Pope, Executrix of the Estate of Pope*, 485 U.S. 478 (1988) ..... 1, 3, 5, 6

## COUNTER STATEMENT OF FACTS

Petitioners' lawsuit against the Estate of Robert John Brady was dismissed by the Circuit Court of Anne Arundel County because the Petitioners failed to present their claim within nine (9) months of Robert John Brady's death, as required by Section 8-103(a)(1), Estates and Trusts Article of the Maryland Annotated Code. The nine-month period expired on August 24, 1990 without the presentation of Petitioners' claim. The Respondent did not mail or otherwise deliver written notice of the time bar to the Petitioners. The Respondent did publish such notice on April 25, 1990, May 2, 1990, and May 9, 1990. (Pet. App. at 5a).

Petitioners appealed the Circuit Court's dismissal to the Court of Special Appeals of Maryland. The appellate court found no evidence suggesting that the Personal Representative was aware of Petitioners' claim before being served with Petitioners' Amended Complaint on January 16, 1991. (Pet. App. at 13a and 14a). In addition, the appellate court ruled that under the circumstances of this case, the Petitioners' claim was not reasonably ascertainable by the Personal Representative. (Pet. App. at 11a). As a result of these findings, the Court of Special Appeals concluded that there was nothing in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), which would require the Respondent to provide Petitioners with actual notice in order to terminate their claim against the estate. (Pet. App. at 11a). The Appellate Court went on to say that, in any event, they had recently held that this nonclaim statute, which was enacted by the legislature in response to *Tulsa*, was not unconstitutional. (Pet. App. at 11a).

The Petitioners assert that the Maryland nonclaim statute violates the Due Process Clause because it allowed for the termination of their claim without actual notice.

## SUMMARY OF ARGUMENT – REASONS FOR DENYING WRIT

I. The Maryland nonclaim statute, Section 8-103 of the Estates and Trusts Article of the Maryland Annotated Code, does not involve significant state action and, therefore, does not implicate due process concerns.

II. Even if Section 8-103(a)(2) of the Maryland nonclaim statute, involved sufficient state action to implicate due process; it is triggered by actual notice and, therefore, does not violate the Due Process Clause.

III. Petitioners lack standing to contest the constitutionality of Section 8-103(a)(2) of the Maryland Annotated Code, where it played no part in the dismissal of their case.

IV. Where the Maryland Court of Special Appeals determined that Petitioners' claim was not known or reasonably ascertainable by the Personal Representative, its termination without actual notice did not violate due process.

V. Due process does not require actual notice to those with mere conjectural claims.

## ARGUMENT

### I.

### THE MARYLAND NONCLAIM STATUTE IS SELF-EXECUTING.

The Petitioners rely on the case of *Tulsa Professional Collection Services, Inc. v. Pope, Executrix of the Estate of Pope*, 485 U.S. 478 (1988), to support their contention that the Maryland nonclaim statute violates due process. Their reliance is misplaced.

The *Tulsa* case involved an Oklahoma nonclaim statute which was triggered by legal proceedings and which required only notice by publication to terminate a claim. The Court in *Tulsa* held that where legal proceedings trigger the nonclaim statute, there is sufficient state action to implicate due process concerns. *Id.* at 487 and 491. The Court went on to say that if a creditor's identity was known or reasonably ascertainable, then the Due Process Clause requires that the creditor be given "notice by mail or other means as certain to ensure actual notice". *Id.* at 491.

The Maryland nonclaim statute bears little, if any, resemblance to the Oklahoma statute involved in *Tulsa*. In fact, the Maryland statute was enacted as a result of the *Tulsa* decision. Its constitutionality was upheld by the Maryland Court of Special Appeals in two cases. (Pet. App. at 11a). See *Ohio Casualty Ins. Co. v. Hallowell*, 94 Md. App. 444, 617 A.2d 1134 (1993); see also *Lampton v. LaHood*, 94 Md. App. 461, 617 A.2d 1142 (1993).

The Maryland statute has two parts. The first part of the Maryland nonclaim statute, Section 8-103(a)(1), provides that the limitation period runs automatically from the time of the decedent's death. Unlike the Oklahoma statute, it is self-executing in that death commences the running of the period and the passing of that period, regardless of state action. Due process concerns are not implicated by such a self-executing limitation statute. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

The second part of the Maryland nonclaim statute, Section 8-103(a)(2), allows the personal representative to shorten the nine-month period by mailing or otherwise delivering written notice to the creditor. It too differs from the Oklahoma statute. Specifically, it is not triggered by action mandated by state legal proceedings. Rather, the personal representative has the option of shortening the nine-month period by mailing or otherwise delivering written notice. If the personal representative elects not to take this action, then the shortened period does not come into play. As a result of this difference, the amount of state action involved in the triggering of 8-103(a)(2), if any, falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

## II.

## SECTION 8-103(a)(2) OF THE MARYLAND NONCLAIM STATUTE COMPLIES WITH THE DUE PROCESS CLAUSE.

Even if Section 8-103(a)(2) involves sufficient state action to implicate due process concerns, there is no due

process violation where the section is triggered by the mailing or otherwise delivering of written notice to the creditor. Mailing or delivering written notice is actual notice for due process purposes. *Tulsa, supra,* at 490 and 491. Where there is actual notice, there is no due process violation.

## III.

## PETITIONERS LACK STANDING TO CONTEST THE CONSTITUTIONALITY OF SECTION 8-103(a)(2) OF THE MARYLAND NONCLAIM STATUTE.

The Petitioners concentrate on Section 8-103(a)(2) to show a due process violation. Their argument is meritless. First, Section 8-103(a)(2) played no part in the dismissal of the Petitioners' claim. Therefore, Petitioners have no standing to challenge its constitutionality.

Secondly, Petitioners' version of Section 8-103(a)(2) bears no resemblance to the actual statute. Specifically, the Petitioners state that Section 8-103(a)(2) is triggered by the "posting of notice," rather than by the mailing or otherwise delivering of written notice. (Pet. at 7). Furthermore, Petitioners conclude that Section 8-103(a)(2) was triggered in their case when notice was "published" in the Maryland Gazette. (Pet. at 8). Obviously, any argument based on such a misreading of the statute is totally meaningless.

## IV.

## THE DUE PROCESS CLAUSE DOES NOT REQUIRE ACTUAL NOTICE TO UNKNOWN CREDITORS OR THOSE WHOSE CLAIMS CANNOT BE ASCERTAINED THROUGH REASONABLY DILIGENT EFFORTS.

The Maryland Court of Special Appeals found no evidence suggesting that Respondent was aware of Petitioners' Complaint before being served with Petitioners' Amended Complaint on January 16, 1991 (Pet. App. at 13a and 14a). In addition, the Court of Special Appeals concluded that the Respondent could not have ascertained the Petitioners' claim through reasonably diligent efforts (Pet. App. at 11a).

Where, as in this case, the claim was neither known nor reasonably ascertainable by the Personal Representative, its termination without actual notice does not violate due process. For creditors who are not reasonably ascertainable, publication notice can suffice. *Tulsa, supra,* at 490.

## V.

## DUE PROCESS DOES NOT REQUIRE ACTUAL NOTICE TO THOSE WITH MERE CONJECTURAL CLAIMS.

Everyone who may conceivably have a claim is not properly considered a creditor entitled to actual notice under the Due Process Clause. It is reasonable to dispense with actual notice to those with mere conjectural claims. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). Clearly, Petitioners' claim against the

Estate of Robert John Brady was not of a definite or liquidated nature. It was based in tort and was, at best, conjectural. Under these circumstances, even where due process concerns are implicated, actual notice is not required and publication will suffice.

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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